

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**



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# 74-1550

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## United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1550

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UNITED STATES OF AMERICA,

*Appellee,*

—against—

FRANK RUSSO

*Appellant.*

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BRIEF FOR APPELLANT FRANK RUSSO

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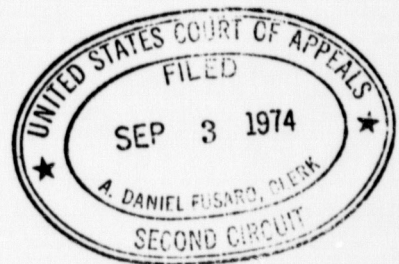


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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

FRANK RUSSO, et al,

Defendants-Appellants.

Docket No. 74-1550

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT FRANK RUSSO

Introductory Statement

Frank Russo, a defendant in this case, appeals from the judgment of conviction entered in the United States District Court of New York, after a trial before Honorable Kevin T. Duffy of conspiring to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code charged in Count I of the indictment and a violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code, charged in Count sixteen of the indictment.

Statement Of Issues Presented For Review

The issues on this appeal are:

- (1) Whether the refusal of the District Court to grant a mistrial to the defendant, after reading to the jury a charge which had been severed constituted reversible error.



### Statement Of The Case

The defendant was charged in the indictment with knowing, willful and intentional participation in a conspiracy to violate various federal narcotics laws. In addition the defendant was charged in Counts 16 and 26 of the indictment with knowing, intentional and unlawful distribution of heroin and possession of heroin with intent to distribute on two separate occasions.

Prior to trial Count 26, charging possession with intent to distribute and distribution of a quarter kilo of heroin on January 10, 1973, was severed.

As part of the prosecutions case in respect to the charges contained in Count I of the indictment concerning conspiracy, evidence was introduced that the defendant did sell to one Albert Casella, a police officer, on January 10, 1973 a half kilogram of heroin (3510-3542).

The Court in its charge to the jury (Vol. T 37 p. 5212) read Count 26 to the jury even though it had been severed prior to trial.

Counsel for defendant objected to the erroneous charge (Vol. T 37 p. 5222) and requested a mistrial.

Subsequently after argument of counsel (Vol. T 37 p. 5225-5227) the District Court denied defendant's motion for a mistrial (Vol. T 37, p. 5227).

The District Court informed the jury (Vol. T 37 p. 5229)

"Ladies and gentlemen, when I talked to you this morning I read to you Count 26 of the indictment. Count 26 has been severed, you are not to consider it at all".

At the conclusion of the charge counsel objected to the limited cautionary instruction (Vol. T 37 p. 5342).

The District Court declined to elaborate any further (Vol. T 37 p. 5344).

#### ARGUMENT

##### POINT I

THE REFUSAL OF THE DISTRICT COURT  
TO GRANT A MISTRIAL, AFTER READING  
TO THE JURY A CHARGE AGAINST THE  
DEFENDANT WHICH HAD BEEN SEVERED  
CONSTITUTED REVERSIBLE ERROR

Clearly the District Court in its charge to the jury committed error in respect to the defendant Russo by informing them that another charge was pending against the defendant (Vol. T 37 p. 5212). The real difficulty in this case is that the severed count charged possession and distribution of a quarter kilogram of heroin on January 10, 1973 whereas evidence introduced at trial in respect to the conspiracy count described a transaction on January 10, 1973 which involved a half kilogram of heroin. Under the foregoing facts the jury was incorrectly advised of the severed charge and the error was compounded when the jury was informed that it was a different transaction from that previously described during the trial. The only inference



left to the jury was that the defendant had allegedly participated in two sales on January 10, 1973.

The Supreme Court noted in Bruton v. United States, 391 U.S. 123, 20 L. ed. 2d 476, 88 S. Ct. 1620, at page 129 that instructions to a jury to disregard that which they have heard is largely an exercise of futility.

In the present case one can only guess at the affect the reading of the severed count had on the jury.

The seriousness of the situation was acknowledged by the District Court (Vol. T 37 p. 5344-5345) in its inability to give a further corrective instruction to the jury.

The defendant asserts that this Court cannot look into the minds of the trial jury to determine the seriousness of the District Courts error in affecting the jurys verdict and should not.

Defendant asserts that the error by its very nature prejudiced the defendant's right to a fair trial.



CONCLUSION

Pursuant to Rule 28(i) of FRAP defendant-appellant joins in those issues raised by the other appellant's insofar as they may be applicable to him.

The judgement of the District Court should be reversed and a new trial granted to the defendant.

Dated: Queens, New York  
August 28, 1974

Respectfully submitted,

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